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Br8:BWeberman

JAN 18 1991

Chief, Examination Division  
~~St. Paul District~~

Assistant Chief Counsel  
Passthroughs & Special Industries CC:P&SI:8

Technical Assistance Request  
Initiated by Revenue Agent Mark Fischer

This is in reply to your request for technical assistance with respect to the application of the wagering excise taxes on certain coin-operated gaming devices.

In your request, you describe several taxpayers who operate coin-operated video poker machines. These machines are coin-operated gaming devices within the meaning of section 4462 of the Internal Revenue Code as in effect for years beginning before July 1, 1980. You ask whether the operation of these machines constitutes a wagering activity subject to liability under section 4401 or 4411 of the Code in that their operation is unlawful in the State in which they are operated.

#### DISCUSSION

Section 4402(2) of the Code provides:

Sec. 4402. No tax shall be imposed by this subchapter--

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(2) COIN-OPERATED GAMING DEVICES.-- On any wager placed in a coin-operated gaming device (as defined in section 4462 as in effect for years beginning before July 1, 1980), or on any amount paid, in lieu of inserting a coin, token, or similar object, to operate a device described in section 4462(a)(2) (as so in effect) . . .

Section 4402(2) draws no distinction among devices that are authorized under the law of the State where the device is used and devices that are unlawful in the State where the device is

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used. Accordingly, wagers imposed on all coin-operated gaming devices are exempt from the section 4401 and 4411 taxes, regardless of whether the device's operation is lawful.

In support of the position that coin-operated gaming devices are subject to the section 4401 and 4411 taxes you cited S. Rep. No. 95-1263, 95th Cong., 2nd Sess., 1978-3 CB 315, 517. The Senate Report, in discussing the repeal of the tax on such devices for years beginning after June 30, 1980 states:

The committee understands that the tax on slot machines was never intended as a revenue raising measure, but was instituted for oversight purposes in the area of coin-operated gaming devices. The Commission on Review of the National Policy Toward Gambling has recommended that State governments have sole jurisdiction with respect to legalized gaming activity. (emphasis added)

You indicate that this supports the position that Congress intended to eliminate from taxation under the wagering tax laws only those machines whose operation is lawful.

For years beginning before July 1, 1980, a tax was imposed upon certain coin-operated devices by section 4461 of the Code. However, the wagering taxes imposed by Subchapter A of Chapter 35 were not then imposed upon wagers made in any coin-operated gaming device, whether lawful or not, due to the exemption provided in section 4402(2). The language in the Senate Report notwithstanding, when Congress repealed section 4461 it did not repeal section 4402(2) or materially amend it; accordingly, wagers placed in coin-operated gaming devices continue to be exempt from the wagering taxes due to the application of section 4402(2).

This response is advisory only and does not represent an expression of the views of the Service as to the application of law, regulations, and precedents to the facts of a specific case. Further, the response is not to be furnished or cited to taxpayers or representatives and is not to serve as the basis for closing a case. We have not recommended that the substance of this memorandum be published as a revenue ruling.

We appreciate your continuing efforts in interpreting and administering these laws.

PAUL F. KUGLER  
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(signed) Richard A. Kocak

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